Supreme Court, U.S.
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No. 04 9

# In The Supreme Court of the United States

LAVELLE S. MOORE,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. WHETHER THE TRIAL COURT SHOULD HAVE DECLARED A MISTRIAL WHEN AN ALTERNATE JUROR WHO HAD BEEN DISMISSED WAS RECALLED AND ALLOWED TO REJOIN THE JURORS WHO HAD ALREADY SELECTED A FOREPERSON?

2. WHETHER A.U.S.A. PROSECUTOR KOSHY VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO A FAIR TRIAL WHEN RULE 615 OF THE FEDERAL RULES OF EVIDENCE HAD BEEN INVOKED AND HE DISCUSSED THE TESTIMONY OF CERTAIN GOVERNMENT WITNESSES DURING A RECESS IN THE PRESENCE OF A PERSON WHO WAS STILL UNDER OATH AND WHO HAD NOT BEEN EXCUSED FROM THE WITNESS STAND?

3. WHETHER THE COURT ERRED IN DENYING DEFENSE MOTION FOR PROSECUTORIAL MISCONDUCT WHEN A.U.S.A. PROSECUTOR KOSHY KNEW BEFORE SEEKING A SUPERCEDING INDICTMENT THAT A GOVERNMENT WITNESS SHARED THE SAME LAWYER AS THE APPELLANT?

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## PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Lavelle Moore, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States District Court, Middle District of Tennessee, Nashville Division, entered on February 15th, 2002, affirming the Defendant's conviction for counts 1 through 14, including felon in possession of a firearm.

## OPINION BELOW

The Sixth Circuit Court of Appeals affirmed the decision of the lower court did not select its opinion for publication.

## JURISDICTION

The Sixth Circuit filed its decision on April 1, 2004. Petitioner would submit that this Petition for a Writ of Certiorari is timely filed within the ninety day time period permitted by Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) to review the circuit court's decision on a write of certiorari.

## CONSTITUTIONAL PROVISIONS AND RULES

U.S. CONST. AMEND VI and FED. R. EVID. 615 are reproduced in the appendix.

## STATEMENT OF THE CASE

On September 5, 2001, a Federal Grand Jury returned a one count indictment against Lavelle S. Moore (R. 2, Indictment, pg. 13, Apx. pg. 4).

The indictment charged that on or about August 29, 2001, in the Middle District of Tennessee, the aforesaid defendant, being a person who had previously been convicted of one or more crimes punishable by a term of imprisonment exceeding one year in the State of Tennessee, did unlawfully and knowingly possess, in or affecting commerce, firearms, that is a Taurus .357 caliber revolver and an Intratec TEC-DC9 semi-automatic assault weapon, in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).

On October 22, 2001, Kenneth Crites, appellant's attorney at the district level, waived appellant's presence and on appellant's behalf, pled not guilty to all counts (R. 33, Waiver, pg. 15, Apx. pg. 61).

On February 14, 2001, appellant was sentenced to 85 years (R. 57, Judgment, pg. 18, Apx. pg. 15).

## STATEMENT OF THE FACTS

Trial commenced on November 5, 2001, with a twelve-person jury and two alternates selected and sworn (The Court at TR 5, 24, Apx. pg. 253).

During the course of the trial, A.U.S.A Koshy called witness Ms. Kyndle Crigler in his case in chief (Koshy at TR 316, Apx. pg 330). Ms. Crigler is defendant's former girlfriend and the mother of his child (Crigler at TR 323, Apx. pg. 176). Her first testimony regarding this matter occurred before a Federal Grand Jury during the indictment stage. Her subsequent testimony at the trial was inconsistent with her original Grand Jury testimony. A.U.S.A Koshy stated this inconsistency on the court record (Koshy at TR 371, Apx. pg 260). The Court recessed for the day

and resumed the trial the following morning (The Court at TR 371, Apx. pg. 260).

The next morning the court stated, "We're going to continue with the direct examination of Ms. Crigler. Ms. Crigler, you are still under oath from yesterday" (The Court at TR 378, Apx. pg. 198). After a few more questions from the government, defense counsel began cross-examination by asking whether Ms. Crigler had spoken with anyone in the U.S. Attorney's Office after court had recessed the night before. (Crites at TR 388, Apx. pg. 209 ). She answered "yes" and indicated that she spoke with A.U.S.A Koshy as follows:

> Crites: Okay. Did you feel threatened or intimidated in any way by that conversation?
>
> Crigler: Yes and no.

(Crites & Crigler at TR 389, Apx. pg. 249 ). On re-direct, A.U.S.A Koshy addressed that question as follows:

> Koshy: Now, Mr. Crites asked you whether you felt threatened and intimidated by our conversation last night?
>
> Crigler: Yes.
>
> Koshy: What happened is, after the jury broke, we had a few proceedings here in this court; correct?
>
> Crigler: Yes.

Koshy: Okay. And you were asked by someone, other than me, to make sure you had contact with Sumter Camp; correct?

Crigler: Yes.

(Koshy & Crigler at TR 411, Apx. pg. 345 ). They went to his office and A.U.S.A Koshy called Attorney Sumter Camp at the Federal Public Defender's office and, because he was not in, left a message on his voice mail (Koshy at TR 412, Apx. pg. 208 ).

Koshy: And I relayed to Mr. Camp on his voice mail what had happened in the court?

Crigler: Yes.

Koshy: What some people had said, some people other than me had said?

Crigler: Yes

(Koshy & Crigler at TR 412, Apx. pg. 208 ).

The trial continued and on the third day, defense counsel informed the court of a situation that he characterized as a "serious matter" (Crites at TR 431-433, Apx. pg. 218-220 ). The government intended to call Kirk Campbell, a witness who was being represented by attorney Rayburr McGowan, the same attorney who represented appellant in this matter prior to defense counsel, Mr. Crites (Crites at TR 431, Apx.

pg. 218 ). Mr. McGowan was Mr. Campbell's attorney on the same matter at the time of trial (Crites at TR 431, Apx. pg. 218 ). Both appellant and Mr. Campbell had cooperated with the government and provided information on the matter at hand (Crites at TR 432, Apx. pg. 219 ). Both were represented by Mr. McGowan at the time of proffering that information (Crites at TR 432, Apx. pg. 219 ).

The trial finally reached an end, closing statements were completed, and on Friday, November 9, 2001, the jury retired to the jury room to select a foreperson (The Court at TR 1086, Apx. pg. 313 ). The two alternates were excused from the case at that time (The Court at TR 1086, Apx. pg. 313 ). Deliberations were scheduled to begin the following Tuesday, November 13, 2001, after a three-day, holiday weekend (The Court at TR 1091, Apx. pg 315 ).

On Tuesday, November 13, 2001, one of the jurors was excused because his mother passed away over the weekend (The Court at TR 1106, Apx. pg. 323). The court discussed recalling one of the two alternate jurors and quickly dismissed alternate number one (The Court at TR 1097, Apx. pg. 245 ). Alternate number two, Thomas Suren, was recalled and admitted to the court at that time that he had discussed the case since being excused four days earlier (Suren at TR 1101, Apx. pg. 457 ). The court allowed Mr. Suren to rejoin the eleven remaining jurors against the objection of appellant's counsel (The Court at TR 1102, Apx. pg. 319 ).

After further discussion, the court decided to re-excuse Mr. Suren and deliberate with only eleven jurors, also against the objection of appellant's counsel

(Crites at TR 1104, Apx. pg. 248 ; The Court at TR 1107, Apx. pg. 324 ). The eleven person jury returned a verdict of guilty on counts 1 through 14 (The Court at 1116, 1117, Apx. pg. 326 ).

## REASONS FOR ALLOWANCE OF WRIT

1. **WHETHER THE TRIAL COURT SHOULD HAVE DECLARED A MISTRIAL WHEN AN ALTERNATE JUROR WHO HAD BEEN DISMISSED WAS RECALLED AND ALLOWED TO REJOIN THE JURORS WHO HAD ALREADY SELECTED A FOREPERSON?**

2. **WHETHER A.U.S.A. PROSECUTOR KOSHY VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO A FAIR TRIAL WHEN RULE 615 OF THE FEDERAL RULES OF EVIDENCE HAD BEEN INVOKED AND HE DISCUSSED THE TESTIMONY OF CERTAIN GOVERNMENT WITNESSES DURING A RECESS IN THE PRESENCE OF A PERSON WHO WAS STILL UNDER OATH AND WHO HAD NOT BEEN EXCUSED FROM THE WITNESS STAND?**

3. **WHETHER THE COURT ERRED IN DENYING DEFENSE MOTION FOR PROSECUTORIAL MISCONDUCT WHEN A.U.S.A. PROSECUTOR KOSHY KNEW BEFORE SEEKING A SUPERCEDING INDICTMENT THAT A GOVERNMENT WITNESS SHARED THE SAME LAWYER AS THE APPELLANT?**

The criminal law must seek to provide effective protection for the public and justice to the accused. Its general principles founding liability must be consistent, clear and comprehensible. To accomplish this goal, we have developed Rules of Criminal Procedure. Appellant, Lavelle S. Moore, was denied a fair trial in this case because the Fundamental Rules of Criminal Procedure, rules which are designed to apply to every person who comes before the bar seeking justice, were not followed by the Court.

**1. WHETHER THE TRIAL COURT SHOULD HAVE DECLARED A MISTRIAL WHEN AN ALTERNATE JUROR WHO HAD BEEN DISMISSED WAS RECALLED AND ALLOWED TO REJOIN THE JURORS WHO HAD ALREADY SELECTED A JURY FOREPERSON?**

This Honorable Court has not spoken, however, other Circuits have ruled that it is an error to invite alternates who have been dismissed back to join a jury which has already begun the process of deliberation. In the instant case, both alternate jurors were dismissed at the conclusion of the jury instructions following the proof in the trial (The Court at TR 1086, Apx. pg. 313 ). Then the Court learned of the death of a juror's mother which occurred over the weekend, and decided to call back one of the alternate jurors. Having decided to pass over the first alternate juror because of a question that she posed during the trial, the Court recalled the second alternate juror (The Court at TR 1101, Apx. pg. 318 ). Mr. Suren came back to Court and was asked by the Honorable Judge Trauger whether he had discussed the case with anyone (The Court at TR 1101,

Apx. pg 318 ). He answered, "I spoke with my wife about the case" (Suren at TR 1101, Apx. pg. 318). The wife, who was not present, was not able to be questioned by the Court. The Court then allowed Mr. Suren to rejoin his fellow jurors and retrieve his note pad, which he had left in the courtroom at the conclusion of the proof and charge.

What was discussed behind closed doors when Mr. Suren assumed the role of twelfth juror is unknown. What influence or contamination he might have had on the other eleven jurors is a matter for speculation. Whether the conversation he had with his wife caused him to form an opinion is unclear. However, the rule of law is very clear. It is an error to contaminate a jury with outside influences. In fairness to the Court, Judge Trauger realized this and re-excused Mr. Suren from jury duty (The Court at TR 1107, Apx. pg. 324 ). However, this was after he had already rejoined his fellow jurors and retrieved his trial notes. Granted, Judge Trauger decided to dismiss Mr. Suren in light of the fact that "two or three other Circuits [had] spoken [on this exact issue] and said that once the alternates have been discharged, it would be error to bring them back" (The Court at TR 1104, Apx. pg. 321). However, she failed to see that the contamination or potential tainting of the jury had already taken place.

These same circuit courts that had encountered this issue before were consistent in declaring a mistrial due to the likelihood of an unfair verdict. The District Court in this case, however, ignored the policy behind those decisions. Judge Trauger even went on to say, "I think our safest course of action is to proceed with

eleven jurors under the rules. And Mr. Crites (defense counsel), I presume you are going to object to that?" (The Court at 1104, Apx. pg. 321 ) Mr. Crites did, in fact, object and rightly so. Even if this court feels that a jury of eleven can constitutionally safeguard the rights of a defendant in a criminal case, the matter at hand introduces a more specific issue: whether those eleven jurors can manufacture a fair verdict after being tainted by the return of an excused juror and his subsequent discussions outside the confines of the jury deliberation process. This issue should have been addressed by the Court and a mistrial declared sua sponte.

2. **WHETHER A.U.S.A KOSHY VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO A FAIR TRIAL WHEN RULE 615 OF THE FEDERAL RULES OF EVIDENCE HAD BEEN INVOKED AND HE DISCUSSED THE TESTIMONY OF CERTAIN GOVERNMENT WITNESSES DURING A RECESS IN THE PRESENCE OF A PERSON WHO WAS STILL UNDER OATH AND WHO HAD NOT BEEN EXCUSED FROM THE WITNESS STAND?**

At the commencement of the trial the Court invoked the Rule 615 by asking witnesses to leave the courtroom with the admonition, "Do not discuss your testimony after you have testified with witnesses who have not testified." (The Court at TR 32, 33, Apx. pg. 256 ). Rule 615 or the "Rule", as it is often referred to, states that "...at the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses."

In the Advisory Committee Notes, the purpose of the rule is explained: the efficacy of excluding, or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy and collusion.

Whatever was said about the trial proceedings by A.U.S.A Koshy to a voice mail in the presence of the witness violated Federal Rule of Evidence 615. The discussion in the presence of the witness in such a manner as to evoke a response such as Ms. Crigler gave is unfair to the defendant and inappropriate in a court of law.

**3. WHETHER THE COURT ERRED IN DENYING DEFENSE MOTION FOR PROSECUTORIAL MISCONDUCT WHEN A.U.S.A. PROSECUTOR KOSHY KNEW BEFORE SEEKING A SUPERCEDING INDICTMENT THAT A GOVERNMENT WITNESS SHARED THE SAME LAWYER AS THE DEFENDANT?**

The main issue is *not* conflict of interest as analyzed in the unreported decision of McNeal vs. United States, April 11, 2001 (Westlaw 391980) and cited by the Court in the instant case (The Court at TR 844, Apx. pg 293 ). The real issue is what information, if any, did government witness Campbell and his attorney, Mr. McGowan, give A.U.S.A Koshy that he could use to obtain an indictment or superceding indictment against appellant.

After learning that appellant's previous attorney may have placed appellant in jeopardy, defense counsel immediately objected and motioned for prosecutorial

misconduct accordingly (Crites at TR 431, 628, Apx. pg. 218 ). A.U.S.A. Koshy had knowledge of this conflict as early as September 17th, 2001, and failed to inform defense counsel until Friday, November 2, 2001, the night before trial (Crites at TR 431, Apx. pg. 218; Tr. T. Vol. III. p.628). The Court invited briefs on the motion which were duly filed. (Crites at TR 823, Apx. pg. 239).

According to Attorney McGowan, he knew of the conflict on September 27th, 2001. (McGowan at TR 688, Apx. pg. 360 ). If this is true, he should have informed his successor, Mr. Crites, who had been retained to represent defendant on September 10th, 2001. A.U.S.A. Koshy claims that he knew of the conflict as of September 17th, 2001, yet he too failed to inform defense counsel, Mr. Crites, until the night before trial. A.U.S.A. Koshy acknowledges that McGowan and his client, Mr. Campbell, knew about defendant Moore because he admits that he telephoned Mr. McGowan and they discussed the matter (Koshy at TR 994, Apx. pg. 342 ).

What they discussed is of critical importance to the case before this court. Campbell admits that although he does not remember when the conversation took place, Mr. McGowan told him that some type of Federal indictment "was coming... [his] way" (Campbell TR 703, Apx. pg. 138 ). This might lead a person to believe that McGowan had already represented to A.U.S.A. Koshy Mr. Campbell's willingness to testify against Moore in return for keeping Campbell's case in the State Court system. This would avoid making Campbell a co-defendant of Moore's and further compounding the conflict issue, which was now apparent to both McGowan and Koshy.

Since A.U.S.A Koshy was not questioned under oath, Mr. Campbell refused to waive his Attorney-Client privileges (Campbell at TR 825, Apx. pg. 140 ). Special Agent Conner did not testify so the facts the Court received could never be corroborated and the ends of justice have simply not been met. The gravity of such a course of action cannot be over-emphasized, particularly when the United States had over three weeks to reflect on the now obvious conflict that McGowan's dual representation had caused before going in front of the Grand Jury to seek a substantial superceding indictment.

It is worth noting that until the matter was raised by the defense counsel, A.U.S.A Koshy had not informed the Court at any time of his earlier discovery that Mr. Campbell, his witness, and the Defendant had shared the same lawyer.

Although the motion for prosecutorial misconduct was denied, the trial Court never directly addressed that charge. Instead, the Court found that there was clearly an ethical violation in that Attorney McGowan had represented Campbell in his state case while at the same time representing Moore in his federal case.(The Court at TR 843, Apx. pg. 292 ). The Court recognized that A.U.S.A Koshy should have suggested to Mr. McGowan that he find other counsel for Mr. Moore since he knew that an ethical violation had taken place. However, the Court did not question him under oath, as to his knowledge of the matter even though it contemplated that very scenario at the outset of the trial by stating, "You may even have to testify" (The Court at TR 614, Apx. pg. 264 ).

Any analysis of prosecutorial misconduct must turn on what the Prosecutor knew and when he obtained that knowledge. In this case, the Court failed to ask the Prosecutor whether the information received from either Attorney McGowan or Mr. Campbell was used to obtain the superceding indictment against Appellant Moore. The Trial Court should have conducted a thorough investigation and since A.U.S.A. Koshy was the central figure, he should have been subject to examination by the Court. Instead, the Court agreed with A.U.S.A Koshy that this was the defense's burden. (Koshy & The Court at TR 622, Apx. pg. 266 ).

The Court asked defense counsel to articulate his motion again. One of the allegations raised by the defense was prosecutorial misconduct (Crites at TR 623, Apx. pg. 235 ). Defense made the same motion again (Crites at TR 628, Apx. pg. 237 ). The Court should have proceeded by putting A.U.S.A Koshy under oath instead of treating him as an officer of the Court. Under oath, Mr. Crites would have been able to examine him as a witness.

However, the Court did ask A.U.S.A. the seminal question. The court asked, "What did you use to form the basis for the superceding indictment?" A.U.S.A Koshy answered, "Special Agent Conner testified and summarized the investigation" (The Court & Koshy at TR 629, Apx. pg. 340 ). This was a vague, misleading and evasive answer. It should have been followed up in order to learn what Conner testified to before the Grand Jury on October 10, 2001, and more importantly, where the information he had imparted to the Grand Jury had come from to obtain the superceding indictment (Koshy at TR 631, Apx. pg.

341). The Court's inquiry centered on whether Defendant Moore gave Attorney McGowan any information which was not included in his proffer to A.U.S.A Koshy or Special Agent Conner.

Defendant Moore recalled telling McGowan who his suppliers of drugs were, including Kirk Campbell, a fact that was denied by McGowan. The only person who could have testified as to whether the Government obtained information from McGowan, which was used to seek a superceding indictment against Defendant Moore, was A.U.S.A Koshy. The Court was effectively distracted by the apparent attorney-client conflict of interest and the real issue of prosecutorial misconduct was lost in an ethical fog.

## CONCLUSION

Petitioner, Lavelle S. Moore, respectfully requests that this Court grant the *Petition for a Writ of Certiorari*, and reverse the decision of the Sixth Circuit Court of Appeals and such other relief as the Court deems proper.

Respectfully submitted,
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